89-586

(1)

PETITION NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF NEVADA

LORRAINE MALINAK,
PETITIONER,

v.

EUGENE J. MATELICH,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI

PETITIONER:

LORRAINE MALINAK
(PETITIONER IN PROPER PERSON)
3800 S. DECATUR BLVD., SP. 62
LAS VEGAS, NEVADA 89103
TELEPHONE: (702) 362-0164

86P

ISSUES PRESENTED

Whether negotiation under seal and delivery of negotiable stocks and bonds in the amount of approximately $115,000.00 [pursuant to provisions of Articles 2 and 9 (N.R.S. Chapter 1.030, N.R.S. Chapter 104.200 et seq., and N.R.S. Chapter 104.900 et seq.), Uniform Commercial Code, and pursuant to the common law of England in force in Nevada] constitute a valid and enforceable transfer under Article 1, Section 10, of the United States Constitution, (commerce clause), and constitute a transfer which if not honored by state action will be a taking of property in violation of the 14th Amendment of the United States Constitution.

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PETITION NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF NEVADA

LORRAINE MALINAK,	)
	)
Petitioner,	)
	)
vs.	)
	)
EUGENE J. MALINAK,	)
	)
Respondent.	)
	)

PETITION FOR WRIT OF CERTIORARI

STATEMENT OF JURISDICTION
AND
ISSUES PRESENTED

A. Jurisdiction: Supreme Court Rule 17.1(c).

When a state court of last resort has decided an important question of Federal Law which has not been but should

be settled by the Supreme Court of the United States, TO WIT:

B. Issues Presented

Negotiation under seal and delivery of negotiable stocks and bonds in the amount of approximately $115,000.00 [pursuant to provisions of Articles 2 and 9 (N.R.S. Chapter 1.030, N.R.S. Chapter 104.200 et seq., and N.R.S. Chapter 104.900 et seq.), Uniform Commercial Code, and pursuant to the common law of England in force in Nevada] constitute a valid and enforceable transfer under Article 1, Section 10, of the United States Constitution, (commerce clause), and constitute a transfer which if not honored by state action will be a taking of property in violation of the 14th Amendment of the United States Constitution.

STATEMENT OF THE CASE

A. Nature of Case and Prayer

This petitioner prays this Honorable Court for a Writ of Certiorari addressed to the Nevada Supreme Court and addressed to the Honorable Thomas A. Foley, District Judge, from an opinion by the Nevada Supreme Court filed April 25, 1989 (see appendix) and denial of motion for rehearing entered by Nevada Supreme Court on June 26, 1989, on appeal from a decision from the Honorable Thomas A. Foley, District Judge, entered March 30, 1988, which denied petitioner ownership of approximately $115,000 of negotiable securities which had been duly negotiated and delivered to her by her mother, Mary H. Matelich (deceased) in 1977 approximately nine years prior to her death.

B. Course of Proceedings

The appeal upon which this petition is based arose in the context of a probate action commenced on April 25, 1986, when a petition for probate of will and for letters testamentary was filed in the lower court (ROA 1-16). Except for a few minor matters resolved on objections and orders, the administration of the estate appeared to be proceeding normally until the second amended inventory and record of value was filed on August 18, 1987 (ROA 74A-74E), indicating that the assets of the estate consisted only of a tax refund in the amount of $2,822.00. The following day, a second report and account and petition for dismissal of estate was filed (ROA 61-66), indicating that the expenses of the estate had exceeded the assets received.

Respondent below Eugene Matelich objected to the second report (ROA 67-71), petitioner replied to the objection (ROA 72-74), and evidentiary hearings were held on the following issues: (a) whether or not the claim of petitioner, as surviving joint tenant to safe deposit box #354 at Nevada State Bank, entitles her to all the contents of said box; and (b) whether or not petitioner is the owner of the following assets found in an envelope left by the decedent in said safe deposit box: 1,750 shares of Pacific Power & Light Company; 500 Units of Nuveen Tax Exempt Bond Fund, Series 63, and 500 shares of Puget Sound Power & Light Company. (See ROA 344, lines 11-19; and ROA 99-294).[1]

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[1] Although the reporter's transcript of the November 12, 1987, hearing was designated (ROA 390, lines 16-17), it does not appear in the current index to

On March 30, 1988, the lower court issued its written Decision (ROA 344-350), finding against petitioner on both issues and directing respondents' lower attorneys to "prepare such Findings of Fact, Conclusions of Law and Order as they may deem appropriate." The same were prepared and eventually filed on May 4, 1988 (ROA 353-360), and petitioner herein timely noticed her appeal from same on May 10, 1988 (ROA 371-372).

C. **Statement of Case**

On April 3, 1986, petitioner's mother, Mary H. Matelich, died a resident of Clark County, leaving a will and codicil dated August 22, 1980 and February 6, 1981, respectively (ROA 353).

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the record on appeal. Petitioner will endeavor to correct this through the lower court appeals clerk, or by motion if necessary. For the purposes of this Brief, however, petitioner will refer to the November transcript as "NTR."

The will, prepared and executed in Montana, provided that the decedent's identified household and personal effects, exclusive of investment securities, cash, bonds, and stock, would go to petitioner, while the "residue" of decedent's estate was to be placed in a trust, the income of which would go to the decedent's children (petitioner and Matelich respondent below), with the principal to be distributed to their lineal descendants only on the death of both petitioner and Matelich (respondent below). Additionally, the testamentary trust provided that the survivor of petitioner and Matelich (respondent below) would receive the other's share of the trust income for life. The codicil merely changed the decedent's choice of executor from her accountant, Wayne K. Knutson, to her daughter, the petitioner.

The following facts occurred during the decedent's lifetime, and relate to the extent of her ownership of and her intent regarding the assets at issue in this petition.

In February of 1971, the decedent and the petitioner opened a joint bank account, with approximately $15,000 of the decedent's money and $15,000 of petitioner's money (NTR 106-108), but in April of 1974 the account had to be liquidated in order to pay off a creditor of the decedent's husband and Matelich (respondent below) (NTR 110-111). Although petitioner was never reimbursed through cash for the money she had put into the joint account, the decedent endorsed certain stocks "over to her"[2]

---

[2] Rather than actually changing the name of the record owner through a transfer agent, it appears that the decedent merely "signed off" from the

[those identified in issue (b) above, hereinafter the EXCLUDED STOCK] in October of 1977, stating "you're now half-owner" (NTR 113-114; ROA 114-124).

In April of 1981, 8 months after the will was executed, the decedent moved to Las Vegas, where her daughter had been living since February of 1979, and indeed lived with her for a time (NTR 91, 58,

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certificates so that they became "bearer paper," then wrote petitioner's Social Security number on each certificate (ROA 117-119, 135), presumably to limit their negotiability to petitioner. [The decedent wanted to have the stock re-issued, adding petitioner as a joint tenant, but petitioner said not to because she was going through a divorce at the time (ROA 121).] The parties stipulated to the authenticity of decedent's guaranteed signature on the certificates (ROA 104), but not to who wrote petitioner's Social Security number on them. The lower court received evidence from respondent below, Matelich's handwriting expert on this issue (ROA 232-275), but refused to continue the hearing to receive evidence from petitioner's handwriting expert (ROA 291-294).

65-66; ROA 115). In 1982, nearly two years after the decedent executed the will described above, she became increasingly concerned about her daughter working too hard, and repeatedly stated to others that she shouldn't and wouldn't have to worry about money, and that "everything I have is for my Laurie [Lori]" (see, for example, NTR 60-61, 66-68).

In the fall of 1982, apparently following up on this concern, the decedent had a friend take her to Nevada State Bank to open a safe deposit box "to make sure everything would be for her and Laurie [Lori]" (NTR 68-69). According to the friend, the decedent "said plainly that the box and its contents were for herself and her daughter, her daughter's future, period" (NTR 77-78) - "that Lorraine was going to be a partner on

everything, the box and everything in it" (NTR 77).

Although the friend was not sure of the date (NTR 68), other facts of record indicate that she must have witnessed the decedent opening the first box (#1949) at Nevada State Bank, which was closed when she opened the joint tenancy box (#354) with petitioner on October 1, 1982.[3] Moreover, petitioner

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[3] Among those facts of record are the following: on the day in question, the decedent seemed to know nothing about Nevada State Bank, whose name only came up because the decedent asked the friend where she banked (NTR 68); the decedent was not familiar with the area where the bank was located (NTR 82); the decedent never said anything to indicate that she already had a box there (NTR 83; ROA 154); the friend had to take the decedent to the bank because petitioner was working that day (NTR 83); the signature card (Exhibit E) the friend thought she saw the decedent sign looks identical to the signature card for the first box (Exhibit 1 below), with the exception of the date, a single X mark, and the absence of the signature of petitioner, whom the friend testified was not present

described in great detail the particulars of opening box #354 with her mother on October 1, 1982 (ROA 125 et seq.), including her mother asking for a joint tenancy account (ROA 132), reading the signature card [Exhibit E] (ROA 130), signing it (ROA 131), saying "This is your life" when she handed her the key

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(NTR 87-88); on the day Exhibit E was signed by the decedent and petitioner, the friend was not present, it was petitioner's day off, and her mother had been telling her for approximately a month that she had an important paper for her to sign at the bank (ROA 126-127); without petitioner's signature, the first box, as an individual box, was ineffective for the decedent's stated purpose, whereas the second box, as a joint tenancy box, was consistent with that purpose; the first box was closed the day the second one was opened, which is also consistent with the decedent's stated purpose (see NTR 13 - although the dates thereat cannot possibly be correct - see NRT 18, 28 et seq.); finally, when petitioner and the decedent arrived at Nevada State Bank on October 1, 1982, she told her daughter "We have to go over here," indicating the safe deposit counter, in contrast to the time she went with her friend (ROA 127).

(ROA 131), watching her place in the box all of the envelopes of stocks and other financial instruments the two of them had sorted back in 1981 (ROA 133), including all of the stock and bond/unit certificates introduced in evidence, and concluding "Now everything is ours in joint tenancy" (ROA 134). Petitioner kept the key, but had no reason to enter the box until her mother died (ROA 135), and had previously promised her she would not touch the stock "signed over" to her in 1977 (ROA 116). Both petitioner and the decedent had prior experience with joint tenancy and knew what it meant in terms of ownership (NRT 96, 99-104, 106, 109-112; ROA 124, 132). Moreover, the customer service representative from the bank testified that the language on the signature card is read to the signatories at the time the box is opened (NRT 43).

The signature card (Exhibit E) for the box in question was consistent with this prior experience in providing as follows: "**Joint Tenants** (1) The undersigned do hereby declare and represent that we own, as joint tenants, with rights of survivorship, all of the property of every kind or character at any time heretofore placed in said box and that all property which may be deposited therein by either of us, shall be and is owned by us as such joint tenants. (2) The right of access or control to said box shall not pass to the legal representatives of a deceased holder, but shall remain exclusively in the survivor or survivors. (3) Access to the box and its contents thereof may be by any one of the undersigned without the necessity of notifying or obtaining the consent of any other renter hereto upon

the bank obtaining the required signatures on the entrance record."

It is undisputed that all of the stocks, bonds, and other financial instruments that are the subject of this petition were found in the safe deposit box covered by the above-quoted agreement (ROA 114-116, 162), that the signatures on the agreement and the instruments are genuine (ROA 102-105, 212), and that the decedent was of sound mind at the time she went down to the bank to rent the box (NTR 85).

All other facts of relevance will be presented in the Argument section that follows.

ARGUMENT

If this Honorable Court holds that a joint tenancy was <u>not</u> created in the contents of the subject safe deposit box, then petitioner contends that the lower

court still erred in concluding that she was not entitled to keep the stock her mother gave her in 1977.

For, there was ample evidence before the lower court that the decedent opened a joint bank account with petitioner in 1971, with each of them contributing approximately $15,000.[4] There was also evidence that in April of 1974 the account had been liquidated in order to protect the decedent's home from one of her husband's and son's [respondent below Matelich's] creditors. There was also evidence that, instead of reimbursing petitioner for her share of

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[4] Although the decedent's accountant implied that all of the funds in that account came from the decedent's mother's estate, her mother's death certificate (Exhibit 22 lower) showed that she didn't die, and therefore had no estate from which the funds could have come, until 2 years later.

the money so used, the decedent endorsed the EXCLUDED STOCK with the intention of making a gift to petitioner, stating "you're now half-owner" (see footnote 2, supra). Finally, there was evidence that in 1981 these same stocks were placed in an envelope for identification purposes, and in 1982 that envelope was placed in the subject safe deposit box at the time petitioner received her key.

Given this evidence, Petitioner contends that the lower court's Findings of Fact #31 (no delivery or acceptance) and #33 (no consideration) were not supported by substantial evidence and should be set aside as clearly erroneous. For, as indicated in footnote 4, the only evidence "controverting" a consideration theory was itself shown to be impossible. But more importantly, either the signing of the signature card, or the delivery to

petitioner of the key to the box where the EXCLUDED STOCK was placed was legally sufficient to complete the intended inter vivos gift. See: **Chadrow**, 106 A.2d at 598; **Kleeman**, 256 P.2d at 555; and **Hausfelder**, 176 P.2d at 88.

Moreover, where, as here, the decedent expressed her "wish" that petitioner be "half-owner" of the EXCLUDED STOCKS, other courts have held such expressions to be a present transfer, sufficient to constitute a gift, even though the stocks were not formally transferred until a later date. See, for example, **Berl v. Rosenberg**, 336 P. 2d 975 (Cal. 1959) (decedent's letter stating that he "wished" to open a joint tenancy account with another was held sufficient to create the intended joint tenancy, even though the subject stocks were not formally transferred until after

the decedent's death).

At the very least, it would seem that petitioner should be entitled to a severable one-half-ownership of the EXCLUDED STOCKS, consistent with the plain meaning of the decedent's words at the time the transfer was first attempted. Petitioner only asks that this Honorable court review the evidence on this point, being mindful that delivery, acceptance, and consideration can occur in many ways, including through a key or the signing of a signature card, or through the payment of a debt of another. In some cases, a symbolic or constructive delivery is sufficient. See, for example, **In Re Sweeney's Estate**, 19 N.Y.S.2d 530, 531 (N.Y. 1940).

The decision below constitutes a taking by state action and judicial error in violation of the 14th Amendment to the

United States Constitution and a violation by the State of Nevada through indirect judicial legislation of Article 1, Section 10, of the United States Constitution, the contract laws. See: **Bridge** 11 Peters 420; **Dartmouth College** 17 U.S. 518; **Fletcher** 6 Cranch 87; **Ogden** 12 Wheaton 213.

PRAYER FOR RELIEF

WHEREFORE, This petitioner prays this Honorable Court for a Writ of Certiorari addressed to the Nevada Supreme Court and addressed to the Honorable Thomas A. Foley, District Judge, from an opinion by the Nevada Supreme Court filed April 25, 1989 (see appendix) and denial of motion for rehearing entered by Nevada Supreme Court on June 26, 1989, on appeal from a decision from the Honorable Thomas A. Foley, District Judge, entered March 30,

1988, which denied petitioner ownership of approximately $115,000 of negotiable securities which had been duly negotiated and delivered to her by her mother, Mary H. Matelich (deceased) in 1977 approximately nine years prior to her death.

Respectfully submitted:

LORRAINE MALINAK
(PETITIONER IN PROPER PERSON)
3800 S. Decatur Blvd., Sp. 62
Las Vegas, Nevada 89103
Telephone: (702) 362-0164

APPENDIX A

IN THE SUPREME COURT OF

THE STATE OF NEVADA

No. 19102

FILED

APR 25 1989

Clerk of Supreme Court

by /s/Jeanne C. Richards

Chief Deputy Clerk

IN THE MATTER OF THE ESTATE OF	)
	)
MARY H. MATELICH, Deceased, and	)
	)
LORRAINE MALINAK, Executrix,	)
	)
beneficiary and interested party,	)
	)
Appellant,	)
	)
vs.	)
	)
EUGENE MATELICH,	)
	)
Respondent.	)

Appeal from a probate order. Eighth Judicial District Court, Clark County; Thomas A. Foley, Judge.

Affirmed.

Lynn R. Shoen, Las Vegas,
for Appellant,
Shaner & Trent, Las Vegas,
for Respondent.

O P I N I O N

PER CURIAM:

This opinion concerns the effect on the title of individually owned property when the owner places the property in a joint tenancy safe-deposit box and signs a signature card for the safe-deposit box declaring that all property placed in the box shall be joint tenancy property. We hold that the signature card does not create a joint tenancy in the property because the card is not a title-changing writing required by NRS 111.065(2) to create a joint tenancy. Accordingly, we affirm the district court's order.

Facts

Mary Matelich and her daughter, Lorraine Malinak, opened a joint tenancy safe-deposit box into which Matelich deposited her stocks and bonds, totaling approximately $600,000 in value. The card that they signed to open the safe-deposit box stated, in pertinent part, as follows:

> Joint Tenants (1) The undersigned do hereby declare and represent that we own, as joint tenants, with the right of survivorship, all of the property of every kind or character at any time heretofore placed in said box and that all property which may be deposited therein by either or any of us, shall be and is owned by us as joint tenants. . . .

Matelich subsequently passed away, and Malinak claimed that the stocks and bonds became joint tenancy property when Matelich placed them in the safe-deposit box. Malinak argued before the district

court that the stocks and bonds should not be distributed according to the terms of Matelich's will because they became Malinak's by right of survivorship. The district court disagreed and included the stocks and bonds in the probate estate.

Discussion

The American Law Reports notes that the majority of states hold that property placed in a safe-deposit box becomes joint tenancy property if the signature card so provides. 14 A.L.R. 2d 948, 982. We, however, question the wisdom of this rule as did the author of the A.L.R. annotation:

> [O]ne should be quick to add that this is hardly to be classed as a choice method of arranging title.
>
> The reasoning applied in the cases denying that joint ownership can be created by agreement and deposit is entirely consonant with legal thinking. It is difficult to find in the deposit anything

> closely approaching a traditional title-changing event. . . .
>
> [W]ill intent (assuming intent plus deposit can change title), clearly expressed by the parties at the time of taking a safe-deposit box, that articles placed therein shall be jointly owned, prevail if it appears that a later deposit was meant to be temporary or that the depositor forgot the terms of the leasing agreement, or where an effect bears indicia of another kind of ownership?

Id., at 982-83..

Pennsylvania has rejected the majority rule that the signature card creates a joint tenancy in the contents of the safe-deposit box. In re Estate of Secary, 180 A.2d 572 (Pa. 1962). The facts of Secary are very similar to the facts of this case except that the holders of the safe-deposit box were brothers. The decedent had deposited stock certificates registered solely in his name in a safe-deposit box which the

brothers rented with a provision on the signature card that the contents would be joint tenancy property. The court held that the stock certificates remained the property of the decedent's estate alone because no valid inter vivos gift of a joint interest with right of survivorship had been made. Id., at 575.

In favor of finding that the contents of the box in this case became joint tenancy property, Malinak cites to a Nevada case in which a signature card for a joint bank account created a joint tenancy with right of survivorship in the money deposited. Weinstein v. Sodaro, 91 Nev. 638, 541 P.2d 531 (1975). However, Weinstein is based on a statute governing the ownership of bank accounts. See NRS 100.085. There is no such statute for safe-deposit boxes, and we decline Malinak's invitation that we extend the

Weinstein holding to joint tenancy safe-deposit boxes.

The signature card that Matelich and Malinak signed was a declaration to the bank that they would deposit only joint tenancy property in the box. The bank apparently wishes to avoid the problems that might arise if one joint tenant of the safe-deposit box has access to the box while it contains the other joint tenant's individually owned property. While the declaration is an agreement between the bank and the renters of the box that the renters will put nothing but joint tenancy property in the box, the declaration is not sufficient to create a joint tenancy in the contents of the box because it is not an agreement between the renters and is not a title-changing instrument. The signature card does not, therefore, satisfy the requirement of NRS

111.065(2) that a joint tenancy be created by a writing.

The district court properly found that the stocks and bonds belonged to Matelich only and became part of her estate at her death. We have also considered Malinak's remaining assignments of error and have concluded that they are likewise without merit. Therefore, we affirm the district court's order.

/s/ Young , C.J.
Young

/s/ Steffen , J.
Steffen

/s/ Springer , J.
Springer

/s/ Mowbray , J.
Mowbray

/s/ Rose , J.
Rose

Attest: A full, true and Correct Copy.

Clerk of the Supreme Court

By /s/ Sharon E. Page Deputy

APPENDIX B

IN THE SUPREME COURT OF

THE STATE OF NEVADA

No. 19102

FILED

JUN 26 1989

Clerk of Supreme Court

by /s/J.

Chief Deputy Clerk

IN THE MATTER OF THE ESTATE OF)
)
MARY H. MATELICH, Deceased, and)
)
LORRAINE MALINAK, Executrix,)
)
beneficiary and interested party,)
)
Appellant,)
)
vs.)
)
EUGENE MATELICH,)
)
Respondent.)

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Young , C.J.
Young

/s/ Steffen , J.
Steffen

/s/ Springer , J.
Springer

/s/ Mowbray , J.
Mowbray

/s/ Rose , J.
Rose

cc: Hon. Thomas A. Foley, District Judge

Lynn R. Shoen

Shaner & Trent

Loretta Bowman, Clerk

APPENDIX C

DISTRICT COURT

CLARK COUNTY, NEVADA

FILED

MAR 30 11:42 AM '88

/s/ Loretta Bowman

CLERK

CASE NO. P 21248

DEPT. NO. XIII

In the Matter of the Estate of)
)
MARY H. MATELICH)
)
Deceased.)
)

D E C I S I O N

On March 7, 1988, at the hour of 10:30 A.M., this Court undertook the hearing on the issues framed, pursuant to the Order of Court submitted by DONALD R. DAVIDSON, III, Esquire, attorney-for Petitioner herein, said issues being specifically enumerated as follows: "(a)

whether or not the claim of LORRAINE MALINAK, as surviving joint tenant to safe deposit box #354 at Nevada State Bank, entitles her to all of the contents of said box; and (b) whether or not LORRAINE MALINAK is owner of the following assets found in an envelope left by the decedent in safe safe deposit box: 1,750 shares of Pacific Power & Light Company; 500 Units of Nuveen Tax Exempt Bond Fund, Series 63; and 500 shares of Puget Sound Power & Light Company."

The Court, since the hearing, has been concerned with the position taken by Petitioner that this Court can and should delve back into the evidentiary basis of a trial leading to the landmark decision in In Re Condos's Estate", 70 Nev 271, 266 P2d 404 (1954). Upon a very careful examination of Petitioner's Exhibit 13 in

evidence (by use of a magnifying glass), the Court is of the opinion that it matters not whether the Court can or should consider the exhibit procured from the trial of the aforementioned case in the Second Judicial District Court. What is of prime significance is that the signature cards in that case are not materially distinguishable from those in the instant case.

During the course of the trial, both in the Petitioner's case-in-chief, as well as Objector's case-in-chief, considerable evidentiary materials and testimony were adduced to establish handwriting, and indeed proposed Exhibits for Petitioner, 17, 18 and 19, are blow ups of portions of the handwriting in question and were prepared in advance of the evidentiary hearing on March 7th by either Petitioner's counsel or someone at

his direction. It is a fact that by way of discovery as early as October or November of last year, Petitioner knew of the existence of a handwriting expert by Objector. Petitioner was also aware that by discovery, Objector sought the name and address or the identity of Petitioner's prospective expert. It is further a fact that up to and including the end of Petitioner and Objector's case-in-chief, there was never any indication of the existence of a handwriting expert for and on behalf of Petitioner, notwithstanding that this case rested heavily on the question of who indeed was the person who executed certain legends to effect the transfer of stock the subject of issue (b) referred to hereinabove.

Suffice to state that upon the conclusion, the Petitioner having rested,

Objector having concluded his case-in-chief, for the first time Petitioner's expert, or the existence of such an expert, came to light, the Court did direct to Mr. DAVIDSON that he call his next witness, at which time Mr. DAVIDSON responded "I have a rebuttal witness who is not available. I would like to ask for a short continuance. The witness is a document examiner who lives in Los Angeles and he is out of the country. His name is William Bomantle (phonetic). He will be available next week, but he is out of the country." The Court inquired of Mr. DAVIDSON to learn that he had been advised of his missing witness "Last week", obviously sometime during the week of February 29th through March 4th. Objection was taken by Objector who pointed out that although there had been a free flow of information exchanged

between counsel, there had never been the answer to request for discovery as to experts by the Petitioner, and it was thereafter determined by questions of counsel and the Court that the expert was retained for his expertise as to the handwriting on the stock certificates concerning the social security number and that he had indeed been retained some time, according to Mr. DAVIDSON, in November or December of last year. It was, therefore, necessary under the attendant circumstances that the Court deny said motion for continuance to await the theretofore undisclosed expert "rebuttal witness".

On March 11, 1988, Petitioner filed in these proceedings an Application to Reconsider Oral Motion for Continuance or, in the Alternative, to Permit Re-Opening of Case or to Permit Testimony of

Expert Witness. Objections have been made and a Reply thereto. The Court heard arguments of Mr. DAVIDSON and PATRICIA TRENT this date and is constrained to deny Petitioner's Motion to Reconsider or in the Alternative to Re-Open.

This case has been fraught with unusual and near bizarre happenings and occurrences. This Court granted a Petition for the Probate of Will and Letters Testamentary on May 23, 1986, and set bond in the sum of $400,000.00. This Order was prepared by DONALD R. DAVIDSON, III, on behalf of the Petitioner LORRAINE MARIE MALINAK, the Order Admitting Will to Probate and the Issuance of Letters Testamentary being executed by the undersigned Court on the 23rd day of May, 1986, and filed in these proceedings on the same date. Incident to these

proceedings, SHANER & TRENT, LTD., by and through PATRICIA A. TRENT, caused to be filed a Request for Special Notice on May 28, 1986. Letters Testamentary were not issued until the 9th day of July, 1986, the bond in the sum of $400,000.00 being posted at that time. On September 30, 1986, an Inventory and Record of Value was filed in these proceedings, as prepared by Petitioner, and her oath, executed and sworn to by her attorney, DONALD R. DAVIDSON, III, as a Notary Public, as well as attorney, submitting said Inventory and Record of Value. This Record established the estate at a value of $502,884.38, the substantial portions of said value being the stocks referred to hereinabove. On or about November 25, 1986, the Petitioner again, by and through her attorney, sought the sale of estate assets and for partial

distribution of income, giving notices of hearing and proofs of said notices. Again, said Petitioner, through her counsel, caused to be filed an Order Approving Payment of Creditor's Claims and permitting the sale of an estate asset. Thereafter, on May 27th, there was an Amended Inventory and Record of Value filed, setting forth the amount and value of $502,264.58. The First Report and Account and Petition for Partial Distribution of Estate and Allowance of Executrix's Commissions and Attorney's Fees, consisting of 12 pages, was filed March 27, 1987, notice of hearing on said Report being duly and regularly given, to which an Objection was filed on April 14, 1987, said Objection being brought by the Objector herein, EUGENE MATELICH, the son of the decedent, whereupon as of May 13, 1987, on application of Objector's

counsel, Judge LEAVITT, on this Court's behalf, did enter an Order authorizing John Keckler, a questioned documents examiner, to examine the envelope in which the several stock certificates were discovered and upon which the purported handwriting of the decedent was alleged to have been found. On June 1, 1987, the Probate Court issued its Order approving the First Report and Account and Petition and for Allowance of Executrix's Commissions and Attorney's Fees. Thereafter, the Petitioner sought a substitution of Executor of the estate, wherein and whereby Nevada State Bank consented to be appointed or substituted as Executor in lieu of Petitioner herein, LORRAINE MARIE MALINAK.

All of said proceedings were prepared by DONALD R. DAVIDSON, III, Esquire. On July 22nd, Objection to the

Petition for Substitution was filed and said substitution was denied pursuant to Order on July 29, 1987. On August 19, 1987, the Petitioner herein, as Executrix, caused to be filed herein a Second Report and Account and Petition for Dismissal of the Estate and a Second Amended Inventory and Record of Value, showing the estate to have the paltry value of $2,822.00, contending that all of the other assets of said estate belonged to the Petitioner herein. It was this action that precipitated the Objection to the Second Report and Account. EUGENE MATELICH, the Objector herein, set forth that by virtue of the law as acknowledged in In Re Condos's Estate, supra, an Executrix attempting to claim most all of the assets of the estate is inappropriate as a matter of law.

Mr. DAVIDSON knew as of September 15, 1987, that based upon the Order that he prepared for my signature, setting forth the issues to be heard upon an evidentiary hearing, the requisite need of handwriting expertise.

It is the considered opinion of this Court, taking into consideration all of the records and files, briefs, exhibits, oral testimony and arguments of counsel heretofore presented in this proceeding as to the claim of LORRAINE MARIE MALINAK, contending that she is the surviving joint tenant of the safe deposit box #354 at Nevada State Bank, entitling her to all of the contents thereof, cannot stand and must be dismissed hence. Further, it is the opinion of this Court that the estate is the owner of all of the assets referred to in issue (b) heretofore set forth and

the claim of LORRAINE MARIE MALINAK to the contrary notwithstanding.

Our Supreme Court in In Re Estate of Condos, supra, succintly stated:

> The bonds at the time of decedent's death were in a bank safe-deposit box held by the parties under joint tenancy agreement with the bank. That agreement in effect provided that each party individually, without notice to or consent of the other, had rights of access to the box, of its surrender and to remove its contents. By the overwhelming weight of authority such an agreement, required by the bank as a matter of practice for its own protection, cannot in and of itself constitute a creation of a joint tenancy in the contents of the box.

Any differences in the signature cards in the Condos matter and that of the instant proceedings are of no moment and do not in any way vary the above and

foregoing determination of this Court. Hence, the Court is not required to search further for authority for or against going beyond the written decision of our Supreme Court to determine whether the Court can or should consider such evidence adduced at the trial level of such case. In Re Condos's Estate remains the substantial authority for which it has been recognized lo these many years.

SHANER & TRENT are directed to prepare such Findings of Fact, Conclusions of Law and Order as they may deem appropriate.

DATED: This 30th day of March, 1988.

/s/ Thomas A. Foley
THOMAS A. FOLEY
DISTRICT JUDGE

APPENDIX D

DISTRICT COURT

CLARK COUNTY, NEVADA

FILED

MAY 4 3:52 PM '88

/s/ Loretta Bowman

CLERK

CASE NO. P 21248

DEPT. NO. XIII

DOCKET G

In the Matter of the Estate of)
)
MARY H. MATELICH, Deceased.)
)

FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ORDER

The continuation of the above-entitled case having come on regularly for hearing before the Court commencing on March 7, 1988; DONALD R. DAVIDSON, III, ESQ. appearing on behalf of the Petitioner, LORRAINE M. MALINAK, and

JEFFREY IAN SHANER, ESQ. and PATRICIA A. TRENT, ESQ. appearing for the Objector, EUGENE J. MATELICH, and the Court having read and considered all of the records and files, briefs, exhibits, oral testimony and arguments of counsel, the Court finds the following facts and states the following conclusions of law:

FINDINGS OF FACT

1. MARY H. MATELICH died a resident of Clark County, Nevada on April 3, 1986.

2. MARY H. MATELICH, (hereinafter referred to as "DECEDENT"), executed a will and codicil dated August 22, 1980 and February 6, 1981, respectively, which provided for the bulk of her estate, (consisting mainly of stocks and bonds titled in her sole name), to be distributed to a trust for the benefit of her children, LORRAINE MARIE MALINAK, (hereinafter referred to as "MALINAK"),

and EUGENE J. MATELICH, (hereinafter referred to as "MATELICH"), as well as two family groups consisting of each of their offspring.

3. MALINAK was appointed as Executrix of DECEDENT'S estate on May 23, 1986 and on July 9, 1986, Letters Testamentary issued to her after the posting of a $400,000.00 bond.

4. MALINAK caused to be filed an Inventory and Record of Value on September 30, 1986, establishing the estate at a value of $502,884.38; on March 27, 1987, the Inventory and Record of Value was amended by MALINAK to reflect a value of $502,264.58.

5. A portion of the stocks and bonds which were titled solely in the DECEDENT'S name were not included in the estate total referenced on either the Inventory and Record of Value or the

Amended Inventory and Record of Value, those stocks and bonds being more particularly described as follows: 1750 shares of Pacific Power and Light Company, 500 Units of Nuveen Tax Exempt Bond Fund, Series 63, and 500 shares of Puget Sound Power and Light Company, (hereinafter referred to as "EXCLUDED STOCK").

6. On March 27, 1987, MALINAK caused to be filed the First Report and Account and Petition for Partial Distribution of Estate and Allowance of Executrix's Commissions and Attorney's Fees to which an Objection was raised on April 14, 1987 by MATELICH, who sought to obtain information concerning MALINAK'S justification for omitting the EXCLUDED STOCKS from the estate inventory.

7. On June 1, 1987, an Order Approving First Report and Account and

Petition and for Allowance of Executrix's Commissions and Attorney's Fees was approved; the remaining portion of said petition with respect to distribution was held in abeyance until a ruling was entered on the objection filed by MATELICH.

8. On July 9, 1987, MALINAK petitioned for a substitution of Nevada State Bank in her place to which MATELICH filed his opposition on July 22, 1987. This petition was denied by Order dated July 29, 1987.

9. On August 19, 1987, MALINAK caused to be filed a Second Report and Account and Petition for Dismissal of Estate and a Second Amended Inventory and Record of Value showing the estate value of $2,822.00, contending that all other assets of the estate belonged to her.

10. MATELICH filed his objection to

the Second Report and Account which resulted in a hearing conducted on November 12, 1987.

11. All the verified pleadings filed during this administration were executed by MALINAK under oath.

12. All pleadings were prepared and submitted by DONALD DAVIDSON as attorney for MALINAK.

13. MALINAK understood the import and content of each verified pleading.

14. MALINAK'S execution of verified pleadings purporting to administer all of the stocks and bonds as part of the estate inventory was inconsistent with her later claim to sole ownership over said assets.

15. The assets of the estate consist in large part of stock and bond certificates discovered in Nevada State Bank safe deposit box number 354 after

DECEDENT'S death.

16. The DECEDENT first opened a safe deposit box with Nevada State Bank, number 1949 on August 20, 1982 which was closed on August 23, 1982; a second safe deposit box was opened by DECEDENT with Nevada State Bank, number 354, on October 1, 1982.

17. The signature appearing on the assignment section of each EXCLUDED STOCK certificate was endorsed by DECEDENT on October 18, 1977.

18. When DECEDENT executed the assignment section of each EXCLUDED STOCK certificate, she did so in order to liquidate the same and utilize the proceeds therefrom to pay anticipated debts.

19. DECEDENT did not execute the assignment section of each EXCLUDED STOCK certificate with intent to transfer any

interest therein to MALINAK.

20. As of the date of DECEDENT'S death, the assignment section appearing on each of the EXCLUDED STOCK certificates was incomplete.

21. The handwritten Social Security number identified as MALINAK'S appearing on each of the assignment sections of the EXCLUDED STOCK certificates was written by MALINAK and not by the DECEDENT.

22. MALINAK acted without court approval in presenting her Letters Testamentary to transfer agents in accomplishing a change of ownership from that of DECEDENT to MALINAK on a portion of the EXCLUDED STOCK, to-wit: the Pacific Power and Light Company stock and the Nuveen Tax Exempt Bond Fund.

23. MALINAK, without court approval, withdraw from the estate account and deposited to her own account

the amount the estate realized from the company's redemption of a portion of the EXCLUDED STOCK, to-wit: the Puget Sound Power and Light Company stock.

24. The Nevada State Bank signature card bearing signatures of the DECEDENT and MALINAK contained language which purported to create a joint tenancy interest in the contents of the box.

25. Nevada State Bank representatives do not, as a matter of practice, explain to customers that they may contract with their bank for the designation of title on a safe deposit box as anything other than as a sole or joint owner, despite the fact that there is available a deputy designation which is designed for the purpose of allowing someone other than a sole owner to gain access to the contents of the safe deposit box.

26. Nevada State Bank representatives do not explain any legal ramifications of the signature card which they ask their customers to sign when contracting with their bank for the security of a safe deposit box.

27. Nevada State Bank requires its customers to sign an agreement on a signature card which the bank, as a matter of practice, uses for its own protection.

28. From the date that the safe deposit box contract was signed on October 1, 1982 until the date of the DECEDENT'S death on April 3, 1986, no one but the decedent entered or gained access to safe deposit box number 354.

29. The DECEDENT held within her possession and control all of the stocks and bonds titled solely in her name including the EXCLUDED STOCK until the

date of her death.

30. The DECEDENT was the sole recipient of all dividend income from all of her stock and bond holdings including income on all of the EXCLUDED STOCK.

31. There was no delivery of any of DECEDENT'S stocks or bonds by the DECEDENT and there was no acceptance of any of DECEDENT'S stocks or bonds by MALINAK.

32. MALINAK and the DECEDENT shared no agreement, written or otherwise, for the joint acquisition of stocks and bonds.

33. MALINAK gave DECEDENT no money or other valuable consideration for the purchase of any interest in the stocks and bonds owned by the DECEDENT.

34. MALINAK, by and through her counsel, retained the services of an expert handwriting witness in November or

December of 1987.

35. Discovery was premised upon open and full disclosure of the names of witnesses and any reports those witnesses may have prepared.

36. MATELICH disclosed the identity of his witnesses and provided MALINAK'S counsel with his expert's report prior to trial.

37. MALINAK failed to disclose the existence or identity of the expert witness until a motion was made at the end of MATELICH'S case-in-chief.

38. MALINAK, by and through her attorney, represented that she was prepared to proceed when the continuation of her case-in-chief resumed on March 7, 1988.

39. MALINAK, by and through her attorney, knew one week prior to the March 7, 1988 hearing that the expert

witness she had previously engaged could not be available on the date of the hearing.

40. MALINAK was not prepared to offer testimony from her expert rebuttal witness because he was not available.

41. MALINAK failed to submit a written motion for a continuance with supporting affidavits in compliance with the requirements outlined in the Eighth Judicial District Court Rules.

42. MATELICH engaged the services of an attorney whose fees approximated $20,000.00 and MATELICH may ultimately expend a total of $35,000.00 including his out-of-pocket expenses.

43. The services of an attorney were necessary to protect the interests of the estate and trust beneficiaries.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over

the settlement of the instant estate pursuant to NRS 136.010.

2. The bank agreement executed between the DECEDENT and MALINAK did not alter existing ownership rights in the property discovered in safe deposit box number 354.

3. The EXCLUDED STOCK are assets of the estate.

4. There was no consideration given by MALINAK for the acquisition of any interest in DECEDENT'S stocks and bonds.

5. MALINAK did not receive any of DECEDENT'S stocks and bonds as a gift during DECEDENT'S lifetime.

6. MALINAK'S motion for a continuance was properly denied.

7. The services of MATELICH'S attorney benefitted the estate and the trust beneficiaries.

8. MATELICH is entitled to reimbursement of attorneys' fees and costs.

ORDER

THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ORDERED, ADJUDGED and DECREED:

The claim of LORRAINE MARIE MALINAK contending her right to take full possession of the contents of safe deposit box number 354 is hereby dismissed; and it is

FURTHER ORDERED that the EXCLUDED STOCK should be included as assets of DECEDENT'S estate; and it is

FURTHER ORDERED that MALINAK'S application to Reconsider Oral Motion or Continuance is denied; and it is

FURTHER ORDERED that MATELICH is entitled to attorneys' fees and costs of suit in the sum of $10,000.00 on account.

JUDGMENT RENDERED: May 04 1988

THOMAS A. FOLEY
DISTRICT JUDGE

SUBMITTED BY:

SHANER & TRENT, LTD.

/s/ Patricia A. Trent

PATRICIA A. TRENT, ESQ.
715 South Sixth Street
Las Vegas, Nevada 89101
Attorney for MATELICH

APPENDIX E

NEVADA STATE BANK

OFFICE WSO #3 BOX NO. 354

NAME MATELICH, MARY H. or LORRAINE MALINAK

DATE OF THIS CARD 10/1/82

[X] JOINT TENANTS

[ ] INDIVIDUAL TENANT

The undersigned hereby rent the safe deposit box identified hereon upon the following terms and conditions:

Joint Tenants (1) The undersigned do hereby declare and represent that we own, as joint tenants, with the right of survivorship, all of the property of every kind or character at any time heretofore placed in said box and that all property which may be deposited therein by either or any of us, shall be and is owned by us as such joint tenants. (2) The right of access or control to

said box shall not pass to the legal representatives of a deceased holder, but shall remain exclusively in the survivor or survivors. (3) Access to the box and the contents thereof may be by any one of the undersigned without the necessity of notifying or obtaining the consent of any other renter hereto upon the bank obtaining the required signatures on the entrance record.

Individual and Joint Tenants (1) The liability of the bank is expressly limited to the exercise of ordinary diligence to prevent the opening of the box during the rental term herein or any extension or renewal thereof, by any person other than renter(s) or his/their duly authorized representative, and such opening shall not be inferable from the loss of any of its contents; not shall the bank be liable for permitting a

deputy of fiduciary agent authorized by any one of the undersigned to have access to and remove the contents of said box after the death or disability of any one of the renters and before the bank has knowledge of such death or disability. (2) The undersigned does/do hereby acknowledge receipt of two keys to the box and further acknowledges that a receipt for the payment of the rental for said box was delivered to him/us this date, upon which is printed the terms and conditions of use now in force, which by this reference is incorporated herein as if set forth in full.

SIGNATURE REQUIREMENTS OF JOINT TENANTS

one

SIG (1) /s/ Mary H. Matelich

NAME - MARY H. MATELICH

SIG (2) /s/ Lorraine M. Malinak

NAME LORRAINE MALINAK

SIG (3) _____

NAME _____

SD-0105 R 8/77

[handwritten] 030-14-03

S/D SIG CARD--PERSONAL

APPENDIX F

407 Pa. 162

In re ESTATE of Arthur SECARY, Late of Conemaugh Township, Somerset County, Pennsylvania, Deceased.

Appeal of Lewis D. SECARY.

Supreme Court of Pennsylvania.

April 17, 1962.

Rehearing Denied May 16, 1962.

Action presenting question as to whether decedent's brother was entitled to contents of a safe deposit box under written lease of such box. From a final decree of the Orphans' Court, No. 330, 1958, Thomas F. Lansberry, J., the brother appealed. The Supreme Court, No. 147, March Term, 1962, Bell, C. J., held that although decedent and his brother were lessees of a safety deposit box as joint tenants, there was no delivery of

contents of box by decedent to brother sufficient to establish an inter vivos gift of the contents, none of which had ever been individual property of the brother, who entered the box only twice and then only after decedent's death and with widow of decedent, who was the only person who had entered the box before his death.

Decree affirmed.

1. **Executors and Administrators -- 221(4) Gifts -- 49(1)**

Claims against a dead man's estate, including a claim of a gift inter vivos, can be established only by evidence which is clear, direct, precise and convincing.

2. **Gifts -- 22**

Although decedent and his brother were lessees of safety deposit box as joint tenants, there was no delivery of contents of box by decedent to brother

sufficient to establish an inter vivos gift of contents, none of which had ever been individual property of brother, who entered box only twice and then only after decedent's death and with widow of decedent, who was only person who had entered box before his death.

3. **Gifts -- 15, 18(2)**

To constitute a valid gift inter vivos of contents of a safe deposit box, there must be an intention to make an immediate gift and such an actual or constructive delivery to donee as to divest owner of all dominion and control, or if a joint tenancy is created, as to invest in donee so much dominion and control of subject matter of gift as is consonant with a joint ownership or interest therein.

Nathaniel A. Barbera, Shaver &

Barbera, Somerset, for appellant.

Frank A. Orban, Jr., Somerset, Wayne G. Wolfe, Spencer, Custer, Saylor & Wolfe, Johnstown, for appellee.

Before BELL, C. J., and MUSMANNO, JONES, COHEN, EAGEN, and O'BRIEN, JJ.

BELL, Chief Justice.

The question involved is narrow. Was decedent's brother entitled to the contents of a safe deposit box under the written lease thereof?

Arthur Secary died intestate on December 23, 1958, at the age of 49. He was survived, inter alia, by his widow, Kay G. Secary, and his mother, Mabel Sicheri, also known as Mabel Secary, as his sole heirs at law, and a brother, Lewis D. Secary, who is the present appellant.

On December 31, 1958, letters of

administration were issued to his widow, Kay G. Secary. Included in the inventory and appraisement were certain contents of safe deposit box number 541B in the Moxham National Bank of Johnstown. These consisted of $109,240 in cash, an agreement of lease dated October 1, 1945, between Bird Coal Company and decedent and an extension of this lease, and 24 shares of the American Telephone & Telegraph Company dated May 12, 1958, in the name of Arthur Secary. The box also contained 12 Certificates of Indebtedness of North Fork Country Club in the amount of $25. each, and 7 U.S. War Savings Bonds totaling $375 in face value which were in the names of Arthur Secary or Mary Secary;[1] these were not listed in the inventory.

---

1. Decedent's first wife. This marriage ended in divorce in 1954, three months before decedent married Kay G. Secary.

The inventory and appraisement also included (a) a checking account in the Moxham National Bank of Johnstown in the name of Kelso Coal Company in the amount of $12,745, and (b) cash contained in envelopes and located in decedent's home in the amount of $8,905.

Appellant, Lewis D. Secary, filed several objections to the inventory and appraisement, but only two are pressed on this appeal, namely, the ownership of the contents of the safe deposit box and the North Fork Country Club certificates, all of which the Orphans' Court held belonged to Arthur Secary's estate.

[1] We start with the well settled principle that claims against a dead man's estate, including a claim of a gift inter vivos, can be established only by evidence which is clear, direct, precise and convincing. Petro v. Secary Estate,

403 Pa. 540, 543, 170 A. 2d 325.

Appellant contents that he has met the burden of proof by presentation in evidence of the lease of safe deposit box number 541B which was executed by both Appellant and decedent. Appellant contends that this lease created a valid inter vivos gift of a joint interest with right of survivorship in all the contents of the box, and that the gift thus created was corroborated by oral testimony.

[2] The lease pertinently provides:

> "Lessor and lessees covenant and agree to and with each other that said box and said space is leased subject to the following terms, conditions, agreement, rules and regulations: * *.
>
> "J. C. *In case the Lessees are joint tenants,*[2] including husband and wife, it is hereby declared that all property of every kind at any time heretofore or hereafter

2. Italics throughout, ours.

> placed in said box is the joint property of both Lessees and, upon the death of either, passes to the survivor subject to inheritance tax laws. Each of the Lessees shall have full access to and the control of the contents of said box without further authority. The Lessor shall not be liable, in the event that property belonging to the joint tenants having access to said box be misappropriated by one or more of those having access. Each or all of the Lessees may appoint a deputy to have access to or surrender the box. * * *
>
> "Lessees hereby acknowledge the receipt of two keys to said box and space".

Appellant bases his claim on King Estate, 387 Pa. 119, 126 A.2d 463. In that case the lease was identically the same as the lease in the instant case, but the Court held that in the light of the oral evidence the contents of the box belonged to the surviving tenant.

The law on the subject of joint accounts was in a state of confusion due

(a) to the fact that the alleged gifts were often evidenced or created by differently worded signature cards or other written instruments or by oral evidence; (b) the fact that in many instances the written instruments (which were executed had been prepared by a bank to cover nearly every conceivable transaction) contained such broad or general language as to be equivocal or ambiguous; (c) the failure to distinguish between an ordinary gift and the gift of a joint interest; (d) practical considerations, especially with respect to the delivery of the contents of a singly or jointly owned safe deposit box; and (e) the uncertainty as to whether the transaction constituted a gift causa mortis, an inter vivos gift, or a contract.

In an attempt to clear up the

confusion[3] we stated and established the principles of law which are applicable in an alleged gift of a jointly owned safe deposit box or the contents thereof (pages 122-124, 126 A.2d page 465-466):

> [3] "To constitute a valid gift inter vivos of the contents of a safe deposit box, two essential elements are requisite: An intention to make an immediate gift, and such an actual or constructive delivery to the donee (a) as to divest the donor of all dominion and control, or (b) if a joint tenancy is created, as to invest in the donee so much dominion and control of the subject matter of the gift as is consonant with a joint ownership or interest therein. The burden of proof is upon the claimant to prove the gift by clear and convincing evidence. Tomayko v. Carson, 368 Pa. 379, 83 A.2d 907. Where an owner of a safe deposit box and his donee execute a contract or lease which recites that the property therein is the joint property of the lessees, with

3. The confusion is analyzed and reviewed in the majority and dissenting opinions in Chadrow v. Kellman, 378 Pa. 237, 106 A.2d 594.

right of survivorship, and that the lessees acknowledge the receipt of two keys to said box--this creates a prima facie case of a valid inter vivos gift of a joint interest (with right of survivorship) in said property. The majority view appears to be that parol evidence is admissible (a) to prove an intention, or lack of intention, to make a gift as well as (b) delivery or failure of delivery, because the instrument is considered to be incomplete or (sometimes) equivocal. Cf. Furjanick's Estate,[4] 375 Pa. 484, 100 A.2d 85. However, it is established that the parol evidence which is necessary to disprove such gift must be clear, precise and * * * [convincing]. Cf. Furjanick's Estate, 375 Pa. 484, 100 A.2d, 85, supra; In re Fell's Estate, 369 Pa. 597, 87 A.2d 310, supra; Mader v. Stemler, 319 Pa. 374, 179 A. 719, supra; Dempsey v. First National Bank of Scranton, 359 Pa. 177, 58 A.2d, 14, supra.

"* * * [S]uch a contract creates a prima facie valid inter vivos gift of a joint interest (with right of survivorship) in all the property in said box, and the

---

4. Footnote omitted.

> burden of proof shifts to the parties contesting the gift to prove a want of intention or a failure of delivery. This burden they have failed to sustain."

The Court then analyzed the oral evidence and found that it supported the contract and a completed inter vivos gift to the donee because, inter alia, (1) when King changed his safe deposit contract with the bank from his name to that of himself and his wife, he told the bank custodian he did not want his wife merely to have access, he wanted a joint contract, (2) King and his wife each possessed a key to the box, and (3) King and his wife had each separately exercised their respective right of access to the box, and consequently King's executrix failed to sustain her burden of proof, viz., to prove a want of intention by King or a failure of delivery. The Court then distinguished

Chadrow v. Kellman, 378 Pa. 237, 106 A.2d 594, for the reason that in that case the Court held there had been no valid inter vivos gift because "it is conceded that decedent alone received and kept both keys to the box and that claimant never had possession of either key and never had access to the box * * * since claimant never had access to the safe deposit box, the donor did not divest himself of dominion over the property claimed * * *."

These facts point up the distinction between King Estate and the instant case. In the instant case the uncontradicted evidence shows that decedent entered safe deposit box number 541B on 33 separate occasions between May 26, 1950,[5] and

5. The safe deposit box was originally leased on December 20, 1948. No evidence appears in the record to indicate how many times or who gained

December 23, 1958 (the date of his death), while on the other hand Appellant entered the box only twice--both occasions being after Arthur Secary's death and in the company of Arthur's widow. Furthermore, both keys to the box were kept in decedent's home and on the two occasions when Appellant entered the box, decedent's widow produced the key because Appellant did not have a key in his possession.

It is important to further note that the stock, the coal company lease, the country club certificates and the War Savings bonds were all in the name of the decedent (or his former wife) and claimant never asserted that these or the cash which was found in the box had ever been his individual property.

---

access to the box between December 20, 1948, and May 26, 1950.

In the light of this clear, uncontradicted and convincing evidence we conclude that Arthur Secary's estate sustained its burden of showing a failure of delivery of the box and its contents to Appellant. Chadrow v. Kellman, 378 Pa. 237, 106 A.2d 594. Cf. King Estate, 387 Pa. 119, 126 A.2d 463, supra; Grossman Estate, 386 Pa. 647, 126 A.2d 468.

Decree affirmed, costs to be paid by Appellant.

CASE NUMBER: 89-586

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

LORRAINE MALINAK,	)
Petitioner,	)
vs.	)
EUGENE J. MATELICH,	)
Respondent.	)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

Patricia A. Trent, Esq.
SHANER & TRENT, LTD.
715 South Sixth Street
Las Vegas, Nevada 89101
(702) 382-2560
Attorney for Respondent

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

I.

OPINION BELOW

The opinion of the Supreme Court of the State of Nevada appears in 105 Nev. Adv. Op. 42 and is included herein as Appendix "A".

II.

JURISDICTION

Petitioner has attempted to invoke the jurisdiction of this court

under Supreme Court Rule 17.1(c) alleging that the state court of last resort has decided an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States.

III.

QUESTION PRESENTED

WHETHER PETITIONER'S FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE STATE COURT'S RULING THAT THE DECEDENT'S STOCKS AND BONDS WERE ESTATE ASSETS

IV.

STATEMENT OF THE CASE

The facts of the case underlying this Petition for Certiorari are as follows:

MARY H. MATELICH, the mother of Petitioner and Respondent (hereinafter referred to as "Decedent"), died as the sole title owner to an extensive stock and bond portfolio, a

certain portion of which is the subject of the instant action by virtue of Petitioner's claim to ownership thereof. These stocks and bonds reflected the 1977 guaranteed signature of the Decedent, however, the remainder of the assignment section on each certificate was not completed by the Decedent prior to her death.

Petitioner, having been designated as Executrix to the Decedent's estate, ultimately claimed the entirety of the estate assets as her own based upon the fact that all of the Decedent's securities, including the subject stocks and bonds, were discovered in a safe deposit box shared by Petitioner and the Decedent. The Nevada State Supreme Court interpreted the language appearing on the bank's safe deposit box contract as being

insufficient to create a joint tenancy in the contents of the box. The Court further affirmed the findings of the lower court to the effect that there was no delivery of the subject stocks and bonds to Petitioner and no consideration was given by Petitioner for their acquisition.

The Nevada State Supreme Court reviewed the evidence adduced at the hearing before the lower court regarding the reason for the Decedent's endorsement of each stock certificate (the purpose being the Decedent's mistaken anticipation of her need for additional cash immediately after her husband's death in 1977) and the testimony from a handwriting expert, who confirmed that the Social Security numbers appearing on the assignment sections of each of the certificates

were written by the hand of Petitioner and not by the Decedent. Further, at all times during her life, the Decedent held the subject stocks and bonds within her possession and control, in addition to being the sole recipient of all dividend income therefrom.

The Supreme Court of the State of Nevada entered its Opinion on April 25, 1989, finding that the contents of the safe deposit box, including the subject stocks and bonds, were the Decedent's alone and became part of her estate at her death. On June 26, 1989, Petitioner's request for a rehearing was denied.

V.

ARGUMENT

From the time Petitioner asserted her claim to ownership over the subject stocks and bonds to the time her

Petition for Rehearing was denied by the Supreme Court of the State of Nevada, there was no mention made anywhere in the record that a federal question was at issue; indeed there is no federal question to be considered by this Honorable Court for this is a case that involves the construction of a contract relating to a safe deposit box. Furthermore, Petitioner's claim that she received the securities by way of gift was not supported by the weight of evidence heard and considered by the lower court, whose findings were upheld.

In general, the United States Supreme Court has not been anxious to interfere with a State Court's decision relating to the construction of a contract entered into and governed by that state's laws. See American Railway Express Co. v. Kentucky, 273 U.S. 269

(1927). Furthermore, the suggestion of a federal question in the present application is not sufficient because it is not apparent "from the averments of facts upon which the claim must depend that the question is one real and substantial". Consolidated Turnpike Co. v. Norfolk and Ocean View Railway Co., 228 U.S. 596 (1913).

The claim made by Petitioner that the court's action constitutes an important question of federal law which should be settled by the Supreme Court because the transfer, if not honored by state action, would constitute a taking of property in violation of the Fourteenth Amendment of the United States Constitution is an averment that comes too late. A final disposition of the case has been made and, even should this Honorable Court find that a federal

question was presented by virtue of Petitioner's appeal to the Supreme Court of the State of Nevada, the Supreme Court of the United States will not take jurisdiction "unless that question was thereupon considered and passed on adversely by the court". State of Montana v. Rice, 204 U.S. 291 (1907).

The factual findings below were supported by substantial evidence, despite the attempt on Petitioner's part to reiterate her version of the facts in an effort to reopen for a third time Petitioner's claim to ownership of the subject stocks and bonds. Should the decision entered below be modified in any respect, chaos would be the result if individuals like Petitioner could assert ownership over a decedent's solely-titled assets without substantial proof of gift or contribution. In

short, it is submitted that the decision below was fair and should not be disturbed.

VI.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully asserts that certiorari should be denied.

Dated this 8th day of November, 1989.

Respectfully submitted,

SHANER & TRENT, LTD.

Patricia A. Trent

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CERTIFICATE OF MAILING

I hereby certify that on the 8th day of November, 1989, I placed a

copy of the foregoing Respondent's Opposing Brief to the following party at her last known address, by placing a copy of the same in an envelope, postage fully prepaid, first class mail, addressed as follows, and deposited the same in the United States mail as follows:

LORRAINE M. MALINAK
3800 S. Decatur Blvd., Space 62
Las Vegas, Nevada 89103

Laura L. Bolde
An employee of Shaner & Trent, Ltd.

APPENDIX A

IN THE SUPREME COURT OF

THE STATE OF NEVADA

No. 19102

FILED

APR 25 1989

Clerk of Supreme Court

by /s/Jeanne C. Richards

Chief Deputy Clerk

IN THE MATTER OF THE ESTATE OF)
)
MARY H. MATELICH, Deceased, and)
)
LORRAINE MALINAK, Executrix,)
)
beneficiary and interested party,)
)
Appellant,)
)
vs.)
)
EUGENE MATELICH,)
)
Respondent.)

Appeal from a probate order. Eighth Judicial District Court, Clark County; Thomas A. Foley, Judge.

Affirmed.

Lynn R. Shoen, Las Vegas,
for Appellant,
Shaner & Trent, Las Vegas,
for Respondent.

O P I N I O N

PER CURIAM:

This opinion concerns the effect on the title of individually owned property when the owner places the property in a joint tenancy safe-deposit box and signs a signature card for the safe-deposit box declaring that all property placed in the box shall be joint tenancy property. We hold that the signature card does not create a joint tenancy in the property because the card is not a title-changing writing required by NRS 111.065(2) to create a joint tenancy. Accordingly, we affirm the district court's order.

Facts

Mary Matelich and her daughter, Lorraine Malinak, opened a joint tenancy safe-deposit box into which Matelich deposited her stocks and bonds, totaling approximately $600,000 in value. The card that they signed to open the safe-deposit box stated, in pertinent part, as follows:

> Joint Tenants (1) The undersigned do hereby declare and represent that we own, as joint tenants, with the right of survivorship, all of the property of every kind or character at any time heretofore placed in said box and that all property which may be deposited therein by either or any of us, shall be and is owned by us as joint tenants. . . .

Matelich subsequently passed away, and Malinak claimed that the stocks and bonds became joint tenancy property when Matelich placed them in the safe-deposit box. Malinak argued before the district

court that the stocks and bonds should not be distributed according to the terms of Matelich's will because they became Malinak's by right of survivorship. The district court disagreed and included the stocks and bonds in the probate estate.

Discussion

The American Law Reports notes that the majority of states hold that property placed in a safe-deposit box becomes joint tenancy property if the signature card so provides. 14 A.L.R. 2d 948, 982. We, however, question the wisdom of this rule as did the author of the A.L.R. annotation:

> [O]ne should be quick to add that this is hardly to be classed as a choice method of arranging title.
>
> The reasoning applied in the cases denying that joint ownership can be created by agreement and deposit is entirely consonant with legal thinking. It is difficult to find in the deposit anything

> closely approaching a traditional title-changing event. . . .
>
> [W]ill intent (assuming intent plus deposit can change title), clearly expressed by the parties at the time of taking a safe-deposit box, that articles placed therein shall be jointly owned, prevail if it appears that a later deposit was meant to be temporary or that the depositor forgot the terms of the leasing agreement, or where an effect bears indicia of another kind of ownership?

Id., at 982-83..

Pennsylvania has rejected the majority rule that the signature card creates a joint tenancy in the contents of the safe-deposit box. In re Estate of Secary, 180 A.2d 572. (Pa. 1962). The facts of Secary are very similar to the facts of this case except that the holders of the safe-deposit box were brothers. The decedent had deposited stock certificates registered solely in his name in a safe-deposit box which the

brothers rented with a provision on the signature card that the contents would be joint tenancy property. The court held that the stock certificates remained the property of the decedent's estate alone because no valid inter vivos gift of a joint interest with right of survivorship had been made. Id., at 575.

In favor of finding that the contents of the box in this case became joint tenancy property, Malinak cites to a Nevada case in which a signature card for a joint bank account created a joint tenancy with right of survivorship in the money deposited. Weinstein v. Sodaro, 91 Nev. 638, 541 P.2d 531 (1975). However, Weinstein is based on a statute governing the ownership of bank accounts. See NRS 100.085. There is no such statute for safe-deposit boxes, and we decline Malinak's invitation that we extend the

Weinstein holding to joint tenancy safe-deposit boxes.

The signature card that Matelich and Malinak signed was a declaration to the bank that they would deposit only joint tenancy property in the box. The bank apparently wishes to avoid the problems that might arise if one joint tenant of the safe-deposit box has access to the box while it contains the other joint tenant's individually owned property. While the declaration is an agreement between the bank and the renters of the box that the renters will put nothing but joint tenancy property in the box, the declaration is not sufficient to create a joint tenancy in the contents of the box because it is not an agreement between the renters and is not a title-changing instrument. The signature card does not, therefore, satisfy the requirement of NRS

111.065(2) that a joint tenancy be created by a writing.

The district court properly found that the stocks and bonds belonged to Matelich only and became part of her estate at her death. We have also considered Malinak's remaining assignments of error and have concluded that they are likewise without merit. Therefore, we affirm the district court's order.

/s/ Young , C.J.
Young

/s/ Steffen , J.
Steffen

/s/ Springer , J.
Springer

/s/ Mowbray , J.
Mowbray

/s/ Rose , J.
Rose